and 12 of the railway company's petition for rehearing (R. 139, 140).

It does not appear that the Circuit Court, in concluding that the pledge agreement was ultra vires, was guided by these rules of construction laid down by the Supreme Court:

> "* * * Whatever may fairly be regarded as incidental to, or consequential upon those things which the Legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be ultra vires". *Jacksonville, Mayport, Pablo R. & Nav. Co. v. Hooper, 160 U. S. 514, 523, 40 L. ed. p. 523.*
>
> "* * * When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers. The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. * * *". *Ohio & M. R. Co. v. McCarthy, 96 U. S. at page 258, 24 L. ed. p. 695.*

It is clear that the Circuit Court erroneously put the strictest possible construction upon the phrase "as shall be necessary to carry on the business of banking", in section 24 of the National Bank Act, and held in effect that the word "necessary" was used as a synonym for the word "indispensable", contrary to the definition of that term given by the Supreme Court in *McCullough v.*

*Maryland, 4 Wheaton 316, 4 L. ed. 579.* In that case Chief Justice Marshall, in affirming the incidental power of the Federal Government to incorporate a national bank, stated:

> "To its (the constitution's) enumeration of powers is added that of making 'all laws which shall be *necessary* and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the Government of the United States, or in any department thereof'. (Wheat. pp. 412-13, L. ed. pp. 602-603)..
>
> * * * * *
>
> "The argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be '*necessary* and proper' for carrying them into execution. The word '*necessary*' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.
>
> "Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is *convenient*, or *useful*, or essential to another. To employ the means necessary to an end,

> is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word *'necessary'* is of this description" (our italics) (Wheat. pp. 413-414, L. ed. p. 603).

It appears that the decision of the Circuit Court of Appeals conflicts with the views of the Supreme Court because, as stated by it in *First National Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. at page 127, 23 L. ed. 671*, national banks may do "whatever natural persons could do under like circumstances", but "subject to law", as provided in the Act, which term this Honorable Court in *Head v. The University, 86 U. S. at page 530, 22 L. ed. 160*, defined to mean "subject to whatever law" the legislative body "might think fit to pass"; and Congress has not prohibited a pledge of this character by a solvent national bank. Also, the opinion of the Circuit Court appears to be in conflict with the decision of the Supreme Court in *Scott v. Armstrong, 146*

*U. S. at page 510, 36 L. ed. 1063*, in which the Court, construing section 52 of the National Bank Act,[1] stated:

> "Undoubtedly any disposition by a National Bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities, or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the Act are not directed against all liens, securities, *pledges* or equities, whereby one creditor may obtain a greater payment than another, but against those arising or in contemplation of insolvency".

The four preceding quotations were set forth on pages 38-40, 22 and 25, respectively, of the railway company's brief in the Circuit Court, and reference was made to those cases in its petition for rehearing (R. 139, 140).

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[1]Section 52 of the National Bank Act of 1864 (12 U. S. C. A. sec. 91) reads in part:

> "All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, **made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another,** except in payment of its circulating notes, shall be utterly null and void * * *" (emphasis supplied).

In disposing of the railway company's plea of estoppel, the Circuit Court misapplied principles of law announced by the Supreme Court in these three cases: *California Nat. Bank v. Kennedy, 167 U. S. 362; Union Pac. Ry. v. Chicago, 163 U. S. 564;* and *Central Transportation Co. v. Pullman Car Co., 139 U. S. 60;* and it was induced so to do by an erroneous belief that the receiver was entitled to some unusual protection because "the controversy is not between the bank and the railway, but between the railway and the bank's creditors, the bank having failed, and 'the interest of others than the parties' * * * being involved" (R. 125). In reaching this conclusion, the Circuit Court apparently gave no consideration to the decision of the Supreme Court in *Scott v. Armstrong, 146 U. S. at page 507, 36 L. ed. p. 1062,* in which this Court stated that a receiver of a national bank takes its assets, in the absence of a statute to the contrary, "subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached". It also appears that the Circuit Court put out of mind those cases of the Supreme Court holding that "corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations or silence, involve others in onerous engagements and then turn round and disavow their acts and

defeat the just expectations which their own conduct has superinduced".[1]

The Circuit Court has sanctioned the repudiation by a receiver of an agreement which it, while solvent, has induced a depositor to make for the benefit of the bank. This action of the lower court probably is in conflict with those decisions of the Supreme Court in which it has been held that no one but the sovereign is permitted to assert that a corporation's contract is ultra vires,[2] unless by statute they are authorized so to do.[3] The decision of the Circuit Court was based upon the assumption that the receiver had some peculiar property rights, exceeding those of the bank while solvent, in and to the pledged liberty bonds and the deposits which they secured (R. 125), but this assumption appears to be in conflict with the statement of the Supreme Court in *Scott v. Armstrong, 146 U. S. at page 507, 36 L. ed. 1062*, to the effect that a receiver of a national bank takes the assets and moneys passing into his possession "as a mere trustee for creditors, and not for value and without notice and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before

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[1]Chicago, R. I. & P. Co. v. Howard, 74 U. S. at page 392, 19 L. ed. p. 121.

Zabriskie v. Cleveland, C. & C. R. Co., 64 U. S. at page 381, 16 L. ed. p. 498.

[2]Jones v. New York Guaranty & I. Co., 101 U. S. at page 622, 25 L. ed. p. 1035.

Sioux City Terminal R. & Wareh. Co. v. Trust Co. of N. A., 173 U. S. at page 110, 43 L. ed. p. 632.

[3]Blair v. Chicago, 201 U. S. page 451, 50 L. ed. 822.

the liens of the United States and of the general creditors attached".

*3. The Circuit Court of Appeals has decided important questions of general law in a way probably untenable or in conflict with the weight of authority.*

Your petitioner contended in the lower courts that if the pledge agreement was in fact ultra vires, the bank and its receiver hold the railway company's deposits not as general assets of the bank but as a trust fund to which petitioner is entitled, and that the return of its deposits, or their equivalent, would not constitute an unlawful preference under the National Bank Act. The Circuit Court conceded that prior to the pledge agreement the railway company's deposits "were fully protected and their repayment guaranteed by corporate surety bonds" and that "on January 29, 1931, the bank being still a solvent, going concern, the railway was induced by the bank to permit it to substitute for the surety bonds theretofore securing the deposits the Liberty Loan bonds in question", but the Court erroneously concluded there were two agreements between the railway company and the bank,—

> "One, that the bank should pay back to the railway upon demand the sums deposited with it as other general deposits were. This entirely valid contract the receiver has recognized, and has offered to pay the Railway a dividend on account of it. The other is an agreement for security. This we have found to be invalid and without contractual force as beyond the corporate powers" (R. 125).

Having reached this conclusion, the Circuit Court further held:

> "Here is a contract for depositing, which was valid, and one for security which was invalid because of want of power in the bank, of which want of power appellant was as fully charged with knowledge as the bank was.
>
> "The result is simply that though the railway has the right to press its claim for its debt, it cannot do so for the security" (R. 126).

The holding of the Circuit Court that there were two separate and distinct contracts, one of deposit and the other for security, is contrary to the trial court's findings of fact, approved by the attorney for the receiver (R. 95), that the president of the railway company informed the vice president-cashier "that under no circumstances would The Texas and Pacific Railway Company continue its account with and deposits in the First National Bank of El Paso without full and adequate security" (R. 90); and that the railway company's president, believing as true the representations of the bank's officers and attorneys that the pledge agreement and liberty bonds "would protect the deposits of The Texas and Pacific Railway Company in The First National Bank of El Paso as fully and to the same extent as said corporate surety bonds", accepted the pledge agreement and those bonds, cancelled the surety bonds and thereafter continued its account with and made deposits in the First National Bank "relying upon said pledge agree-

ment and liberty bonds as security for its deposits" (R. 92-93).

Furthermore, if it be true, as held by the Circuit Court, that the pledge agreement was ultra vires and that the railway company was charged with this knowledge as fully as the bank itself, those facts alone would not convert your petitioner's deposits into general assets of the bank under the circumstances of this case. The agreement of deposit and not the legal knowledge of the depositor determines the character of the deposit, and the deposit agreement in this case in legal effect was that the railway company agreed that its deposits might become the property of the bank if they were secured; otherwise not.

However, your petitioner questions the correctness of the Circuit Court's holding. Whether or not the bank had the power to make the pledge is at most a mixed question of law and fact, since the bank is expressly authorized to exercise all such incidental powers as shall be necessary—that is, convenient or useful[1]—to carry on the business of the bank, and what may be convenient or useful to it is purely a fact question peculiarly within the knowledge of the bank's officers. They represented and the record shows that the pledge agreement was convenient and useful to the bank; these facts the receiver has not disproved.

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[1] McCullough v. Maryland, supra.

There is some intimation in the Circuit Court's opinion (R. 125), although no positive statement, that a recovery by the railway company of the full amount of its deposits or their equivalent would constitute an unlawful preference over other creditors, but such is not the case. The receiver of a national bank is directed by section 192 of the Act to take charge of all the bank's "assets" and to pay over to the Treasurer of the United States, subject to the order of the Comptroller, all moneys received from the collection of debts, claims, and the sale of property. And the Comptroller by section 194 is directed to make a "ratable dividend" from time to time, under certain conditions, of the moneys turned over to him by the receiver; but the Supreme Court has held in *Scott v. Armstrong, 146 U. S. at page 510, 36 L. ed. p. 1063*, that "the requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank". It seems, therefore, that this statement of the Supreme Court, as applied to the facts of this case, is in conflict with the holding of the Circuit Court that the moneys of the railway company were general deposits and became assets of the bank to be distributed by the receiver ratably among all creditors.

The Circuit Court held that the record does not "support the finding necessary to be made if the power is implied, that the giving of pledges for private deposits is

a reasonable incident to the business of receiving deposits, and necessary to the proper conduct of the business of a national bank" (R. 124). In thus holding, in effect, that the railway company had the burden of proving that it is the practice and custom of national banks to make such pledge agreements, and that the making of them is indispensable to the banking business, it appears that the Circuit Court's decision is in conflict with the principles of law announced by the Supreme Court to the effect that corporations are presumed to contract within their powers, and, *in absence of proof to the contrary,* their contracts are presumed to be valid when not foreign to the purposes for which the corporation is created.[1] The receiver did not rebut this presumption; in fact, he offered no testimony at the trial of the case. If the railway company had any burden of proof it was merely to show that the pledge agreement, in the language of the Supreme Court, was "convenient or useful"[2] to the bank. This burden was fully met when your petitioner proved, as found by the trial court, that the First National Bank by substituting the liberty bonds in lieu of the surety bonds "saved the premiums on said surety bonds, earned 4-1/4% interest on said liberty bonds, and was able to hold the railway company's account" (R. 94).

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[1]Ohio & M. R. Co. v. McCarthy, 96 U. S. at page 258, 24 L. ed. p. 695.
Union Pac. R. Co. v. Chcago, R. I. & P. R. Co., 163 U. S. 564, 41 L. ed. 265.
[2]McCullough v. Maryland, supra.

As an alternative plea the railway company alleged that if the pledge agreement was unenforceable it was entitled to recover from the receiver, as for money had and received, the full amount of its deposits in the bank on September 4, 1931, the date of its failure (R. 10); and a prayer for this alternative relief was included in its amended bill (R. 12). The Circuit Court disposed of this contention in the following language:

> "This is not a case like Aldrich v. Chemical Nat. Bank, 176 U. S. 636; Citizens Nat. Bank vs. Appleton, 216 U. S. 206; Schneider v. Thompson, 58 Fed. (2) 98, of a solvent bank which has obtained the benefit of a transaction, seeking to avoid, on the ground of ultra vires, returning what it has received. In those cases the suit was not on the contract, but on the benefit received. This is not such a case. It is upon a contract, to enforce it" (R. 125).

Your petitioner believes that this disposition by the Circuit Court of its plea for money had and received is in conflict with principles of law announced by the Supreme Court in a number of cases, including *Central Transportation Co. v. Pullman Car Co., 139 U. S. at page 60, 35 L. ed. p. 69; Aldrich v. Chemical National Bank, 176 U. S. at page 636, 44 L. ed. p. 618; Citizens' National Bank v. Appleton, 216 U. S. at page 206, 54 L. ed. p. 446.*

*4. In deciding the case at bar, the Circuit Court of Appeals for the Fifth Circuit based its decision upon principles of law in conflict with those announced by other Circuit Courts of Appeal.*

The Circuit Court of Appeals for the Eighth Circuit in *American Nat. Bank v. National Wallpaper Co., 77 Fed. 85*, in considering the power of a national bank to buy and sell goods and its liability for their purchase price, held:

> "'The great mass of judicial authority', says Judge Thompson, 'seems to be to the effect that, where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it' Thomp. Corp. sec. 6016. Continuing the subject, the learned author further says it is a general principle of law that no party will be permitted to set up the defense of ultra vires while retaining the fruits or the benefits of the contract. This doctrine rests upon the unanswerable ground thus stated in Pennsylvania by Mr. Justice Porter: 'A man who has enjoyed a privilege has no right to say that because he ought not to have enjoyed it he will not pay for it. However unlawful the act, it would be unsound policy to give him this immunity.' Id. sec. 6015. The reason of the rule is that honesty and fair dealing are the highest public policy, and that a private corporation, which is a mere collection of individuals, is no more privileged to repudiate its engagements, and act dishonestly, than a single individual is. Id. sec. 6017. Where, therefore, a corporation purchases property contrary to a prohibition, or without an authorization in its charter, it cannot retain the property, and refuse to pay the price, or set up the defense of ultra vires when sued for the same. Id. sec. 6018. The authorities supporting the text of the learned author are too numerous to require

citation. The doctrine has become familiar learning" (pp. 93-94).

*Williams v. American Nat. Bank, 85 Fed. 376*, also decided by the Circuit Court of Appeals for the Eighth Circuit, was a case in which the plaintiff brought an action against the bank and its receiver to recover $28,250 alleged to be due the plaintiff upon a verbal contract pursuant to which the plaintiff loaned the bank that sum of money to be repaid upon thirty days' notice. On December 8, 1890 the plaintiff demanded payment which was refused; on the next day the bank became insolvent and the Comptroller of the Currency placed it in the hands of a receiver. Upon plaintiff's demand the receiver refused to pay her the money. The defendants contended that the transaction was a purchase of the bank's stock, and that a certificate was delivered to Williams. In her reply, plaintiff alleged that the stock was taken as collateral security for her money. "About the 1st of January, 1890, *the cashier of the bank, knowing its embarrassed condition, to induce her to let her money remain with the bank, persuaded her to believe that a certificate of stock in the bank would be a better security for the money than a certificate of deposit*" * * * (our italics). In reversing a judgment in favor of the defendants, the Circuit Court held:

"The plea of ultra vires interposed against the contract declared on is not tenable. The plaintiff's action, in its essence, is not predicated upon, nor

> is it for the enforcement of, a contract for stock. In effect, the action is for money had and received. It is to recover the amount of money deposited and loaned by the plaintiff with and to the bank. The bank owes the plaintiff for the money left by her with it, independent of the certificate of stock. Such certificate, according to her contention, having been issued by the bank merely as collateral security for the money received from the plaintiff, it is a matter of entire indifference whether that certificate of stock be with or without value, or invalid in law for the want of power on the part of the bank or authority of the cashier to issue it as collateral security for a loan of money made to it. The plaintiff in the petition tenders back to the bank the certificate of stock, and demands her money. It is no defense to an action for money had and received, based upon a good consideration, both in law and morals, for the bank to say that the collateral security it put up with the plaintiff was issued without authority. This proposition so stands to reason and justice as not to require any authorities for its support" (p. 379).

*Burrowes v. Nimocks, 35 Fed. (2d) 152*, by the Fourth Circuit Court of Appeals, was a case in which the receiver of the First National Bank of Fayetteville, N. C., contended that the bank's vice president had no authority to secure deposits of Cumberland County by a pledge and transfer of certain notes to the treasurer of the county. In dealing with the receiver's contention that the bank's officer had no authority to secure the deposit, which the court found to be in the nature of a call loan, and which the laws of North Carolina required to be secured, Judge Parker stated:

> "The vice president was expressly authorized to seek it; and this authority carried by *necessary implication* the power to give the security necessary to obtain it" (our italics) (p. 154).

Also, the Fourth Circuit Court of Appeals in *Schumaker v. Eastern Bank & Trust Co., 52 Fed. (2d) 925*, by Judge Parker, stated:

> "Whether a bank may pledge its assets for the security of an ordinary depositor is a question as to which there is conflict of authority. * * * Although some of the cases draw a distinction between a pledge of assets to secure a deposit of public funds and a pledge to secure a private deposit, there would seem to be, in the absence of statute, no valid basis for such distinction; * * *".

It may be that the foregoing statement of Judge Parker in the Schumaker case can be classed as obiter dictum, but it clearly indicates that should questions such as those in the case at bar be submitted to the Fourth Circuit Court of Appeals, that Court would render a decision contrary to that handed down in this case by the Circuit Court for the Fifth Circuit.

## Prayer for Writ

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Honorable Circuit Court of Appeals for the Fifth Circuit, commanding that Court

to certify and send to the Supreme Court a full and complete transcript of the record and all of the proceedings in the case numbered and entitled on its docket, "No. 6748, The Texas and Pacific Railway Company, Appellant, v. S. O. Pottorff, Receiver of The First National Bank of El Paso, Texas, Appellee", to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; and that the judgment of the Circuit Court of Appeals for the Fifth Circuit be reversed by this Honorable Court, and for such further relief as the Court may deem proper.

Dated at Dallas, Texas, June 1, 1933.

Respectfully submitted,

THE TEXAS AND PACIFIC RAILWAY COMPANY,
*Petitioner.*

By T. D. Gresham
*Of Counsel.*

In the
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1933

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No.....

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THE TEXAS AND PACIFIC RAILWAY COMPANY

*Petitioner,*

*versus*

S. O. POTTORFF, Receiver of The First National Bank of El Paso, Texas,

*Respondent.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### Opinion in the Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit in this case, styled *Texas & P. Ry. Co. v. Pottorff*, is reported on pages 1-5 of Vol. 63 of the Federal Reports (Advance Sheet No. 1).

### Jurisdiction

(a) The judgment to be reviewed is dated January 19, 1933 (R. 119, 126), and the railway company's petition for rehearing was denied on March 8, 1933 (R. 143). By order dated March 17, 1933, the Circuit Court stayed

the mandate until the Supreme Court acts upon this petition for a writ of certiorari (R. 144-145).

(b) The statutory provision which is believed to sustain the jurisdiction of this Honorable Court is section 347 of Title 28, United States Code (Judicial Code, section 240, amended).

(c) This case involves a construction of the National Bank Act of June 3, 1864, and particularly that portion of the Act enumerating the powers of national banks (section 24, Title 12, United States Code). Specifically, the Court is called upon to determine, among other things, whether or not (1) a solvent national bank which has procured the account and deposits of a railroad company by furnishing corporate surety bonds to protect its deposits, has the power to pledge a portion of its assets in lieu of those surety bonds for the purpose of saving bond premiums and affording adequate security due to the threatened withdrawal of one of the surety companies for which a substitute company could not be obtained; and (2) whether a receiver of that bank subsequently appointed by the Comptroller of the Currency may disaffirm such pledge agreement and retain both the pledged assets and the carrier's deposits, although national bank examiners who learned of the pledge agreement from the books of the bank one month before its failure made no complaint of the transaction, and by their silence permitted the carrier thereafter to make substantial deposits (R. 43-49, 88-95). The Circuit Court answered

the first question negatively and the second question affirmatively (R. 124-126), contrary, as petitioner believes, to applicable decisions of this Honorable Court, and in a way probably untenable or in conflict with the weight of authority. These specific questions have not been, but should be, settled by the Supreme Court.

(d) It is believed these cases sustain the Supreme Court's jurisdiction:

*First National Bank v. Chicago T. & T. Co., 198 U. S. 280, 49 L. ed. 1051.*

*Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks, 281 U. S. 548, 74 L. ed. 1034.*

## Statement of the Case

The statement of the case in the preceding petition, pages 2-11, is hereby adopted and made a part of this brief.

## Specification of Errors

In affirming the judgment of the trial court in favor of respondent, the Circuit Court of Appeals for the Fifth Circuit erred in the following particulars:

(1) The Court erred in its finding that the record is "devoid of affirmative proof that the thing the bank did * * * is at all a necessary or desirable practice" (R. 121).

(2) The Court erred in concluding that the record does not "support the finding necessary to be made if

the power is implied, that the giving of pledges for private deposits is a reasonable incident to the business of receiving deposits, and necessary to the proper conduct of the business of a national bank" (R. 124).

(3) The Court erred in its finding and conclusion that the record "shows that with the same uniformity which has attended the recognition of the power of national banks to secure public deposits by pledge, the Comptroller has ruled that they may not do so in the case of private deposits" (R. 121).

(4) The Court erred in holding that "the judicial knowledge of banking practices and customs which we may take establishes" that the giving of pledges for private deposits is not a reasonable incident to the business of receiving deposits and is not necessary to the proper conduct of the business of a national bank; and the Court further erred in basing its decision adverse to petitioner in part upon such judicial knowledge (R. 124).

(5) The Court erred in holding that "a deposit is one thing, a loan another", and in rejecting "the view that implied authority to pledge assets as security for loans extends to pledging them to secure deposits" (R. 124).

(6) The Court erred in holding that "generally speaking a bank's general powers do not authorize it to pledge assets for deposits", that the contract for security "was invalid because of want of power in the bank", that "this bank had no such power * * * because no ex-

press power to do so has been conferred upon it by statute", and because the record does not "support the finding necessary to be made if the power is implied, that the giving of pledges for private deposits is a reasonable incident to the business of receiving deposits, and necessary to the proper conduct of the business of a national bank" (R. 124).

(7) The Court erred in holding in effect that to sustain the bank's implied power to make the pledge agreement, petitioner had the burden of affirmatively proving that such agreement was "necessary to the proper conduct of the business of a national bank" and "accords with national banking practices and customs" (R. 121, 124).

(8) The Court erred in holding that petitioner "was as fully charged with knowledge as the bank was" of the latter's "want of power" to make the contract for security (R. 126).

(9) The Court erred in holding in effect that the receiver could disaffirm the pledge agreement (R. 125).

(10) The Court erred in its conclusion that "this is not a case" like that "of a solvent bank which has obtained the benefit of a transaction, seeking to avoid, on the ground of ultra vires, returning what it has received" (R. 125).

(11) The Court erred in holding in effect that the receiver, as a representative of the bank's creditors, has

rights or equities in and to the pledged liberty bonds different from and superior to those of the bank before the receivership (R. 125).

(12) The Court erred in holding in effect that the case at bar is one "not between the bank and the railway, but between the railway and the bank's creditors" (R. 125).

(13) The Court erred in holding in effect that the receiver was not estopped to assert the invalidity of the pledge agreement (R. 125).

(14) The Court erred in holding in effect that the agreement of deposit in this case definitely fixed the character of the deposit as general (R. 126).

(15) The Court erred in holding that the contract of deposit contained two agreements, viz.: "One, that the bank should pay back to the railway upon demand the sums deposited with it as other general deposits were. * * * The other is an agreement for security" (R. 125).

(16) The Court erred in holding "There is no basis at all here for declaring a trust", and in further holding, in effect, that the railway company, being a "general depositor" in the bank, cannot, because its security failed through an invalidity which in law it knew, have the bank converted into a trustee and itself into a *cestui que* trust of the money of the bank to the extent of the amount of its general deposit (R. 126).

(17) The Court erred in disregarding petitioner's alternative plea for money had and received and in holding that this is not a suit "on the benefits received" but is a suit "upon a contract, to enforce it" (R. 125).

(18) The Court erred in concluding and in holding as a matter of law that the bank's pledge of liberty bonds to secure the railway company's deposit was ultra vires and void.

(19) The Court erred in concluding and in holding as a matter of law that the receiver is not estopped from asserting the invalidity of the pledge agreement without returning or tendering back to the railway company the full amount of its deposits.

(20) The Court erred in concluding and in holding as a matter of law that the railway company's deposits made subsequent to the pledge of the liberty bonds were general deposits, the title to which passed to the bank and were not special deposits the title to which remained and now is in The Texas and Pacific Railway Company.

(21) The Court erred in concluding and in holding as a matter of law that the railway company is not entitled to recover of and from the bank's receiver a sum equal to the full amount of its deposit as for money had and received.

(22) The Court erred in holding in effect as a matter of law that a payment by the receiver to The Texas and Pacific Railway Company of the full amount of its

deposit would be an unlawful preference and prohibited by the National Bank Act.

## Argument

For the sake of brevity, and in order to avoid duplication, your petitioner by reference will incorporate as a part of this argument certain of the reasons assigned in its petition for an allowance of a writ of certiorari in this case.[1] This argument, therefore, will be limited to a statement of points and authorities, appropriate references to the foregoing petition, and such supplemental argument as to your petitioner may appear helpful.

1. A solvent national bank has the power to pledge, as security for a deposit which it desires to procure and/or retain, a portion of its assets equivalent to that deposit.

*New York County National Bank v. Massey, 192 U. S. 138, 145, 48 L. ed. 380, 383; Marine Bank v. Fulton County Bank, 69 U. S. 252, 17 L. ed. 785, 787; Auten v. United States National Bank of New York, 174 U. S. 125, 43 L. ed. 920, 926; Aldrich v. Chemical National Bank, 176 U. S. 618, 626, 44 L. ed. 611, 614; Wyman v. Wallace, 201 U. S. 230, 243, 50 L. ed. 738, 742; Jacksonville, Mayport, Pablo R. & Nav. Co. v. Hooper, 160 U. S. 514, 525, 40 L. ed. 515, 523; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693, 695-696; Union Pacific R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564,*

[1] Petition for writ of certiorari, pp. 11-29, supra.

*581, 41 L. ed. 265, 271; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 384-385, 33 L. ed. 157, 161-162; McCullough v. Maryland, 4 Wheaton 316, 412-414, 4 L. ed. 579, 603; First National Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 23 L. ed. 679, 681; Head v. The University, 86 U. S. 526, 22 L. ed. 160; Scott v. Armstrong, 146 U. S. 499, 510, 36 L. ed. 1059, 1063.*

Your petitioner adopts as its argument under this point the statements containe don pages 12 to 20 of the foregoing petition, being the second division of the reasons relied upon for an allowance of a writ of certiorari in this case.

It is noted that the Supreme Court has cited with approval quotations from Morse on Banks and Banking[1] and your petitioner respectfully calls the Court's attention to this statement by that eminent text writer:

> "A bank may secure persons who loan it money by deposit * * *. Such a power is a mere incident of the right to receive deposits, which by necessary implication gives power to assign and mortgage negotiable instruments as security for them * * *". *Morse on Banks and Banking (6 ed.), Vol. 1, sec. 63, p. 182.*

Another much-quoted text writer is of the same opinion:

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[1]Auten v. United States National Bank of New York, 174 U. S. 125, 141, 43 L. ed. 920, 926.

"Of course, a pledge of assets in contemplation of insolvency for the sake of creating a preference is avoided by Section 5242 of the Revised Statutes (Title 12, U. S. C. A. sec. 91); but, in the absence of a preferential transfer in contemplation of insolvency, there is no federal statute under which a pledge of assets as security for a loan or deposit may be avoided". *Paton's Digest of Banking Law (1926), Vol 1, sec. 641.*

2. A solvent national bank, which has procured a railway company's deposit by furnishing at the bank's expense corporate surety bonds as security, has the power to pledge a portion of its assets, equivalent to that deposit, in lieu of those surety bonds, for the purpose of saving bond premiums, and affording adequate security due to the threatened withdrawal of one of the surety companies for which a substitute company could not be obtained.

In support of this point your petitioner cites, without repeating, the authorities enumerated under its first proposition, and adopts as its argument the statements contained on uages 12 to 20 of the foregoing petition, being the second division of the reasons relied upon for an allowance of a writ of certiorari in this case.

3. A receiver of a national bank has no power to assert that a contract made by that bank for its benefit while solvent, is ultra vires.

*Scott v. Armstrong, 146 U. S. 499, 510, 36 L. ed. 1059, 1063; Jones v. New York Guaranty & I. Co., 101 U. S.*

*622, 25 L. ed. 1030, 1035; Sioux City Terminal R. & Wareh. Co. v. Trust Co. of N. A., 173 U. S. 99, 110, 43 L. ed. 628, 632; Blair v. Chicago, 201 U. S. 400, 450, 50 L. ed. 801, 822.*

Your petitioner adopts as its argument under this point the statements contained on page 19 of the foreing petition, being a portion of the second division of the reasons relied upon for an allowance of a writ of certiorari in this case.

4. A receiver of a national bank is estopped from asserting the want of power in that bank, while solvent, to pledge as security for a deposit a portion of its assets, equivalent to that deposit, in lieu of corporate surety bonds which the bank furnished, at its expense, to procure such deposit, when the substitution is made for the purpose of saving bond premiums and affording adequate security due to the threatened withdrawal of one of the surety companies for which a substitute company could not be obtained, and when deposits have been made on the faith of the pledge agreement. *Chicago, R. I. & P. Co. v. Howard, 74 U. S. 392, 19 L. ed. 117, 121; Zabriskie v. Cleveland, C. & C. R. Co., 64 U. S. 381, 16 L. ed. 488, 498; Eastern Building & Loan Association v. Williamson, 189 U. S. 122, 129, 47 L. ed. 735, 741.*

Your petitioner adopts as its argument under this point, the statements contained on pages 18 to 20 of the foregoing petition, being a portion of the second divi-

sion of the reasons relied upon for the allowance of a writ of certiorari in this case.

5. A receiver of a national bank is estopped from asserting the want of power in that bank, while solvent, to pledge as security for a deposit a portion of its assets, equivalent to that deposit, after national bank examiners, who learned of the pledge agreement from the books of the bank before its failure, made no complaint of the transaction and by their silence permitted the depositor to make further substantial deposits.

In support of this point, your petitioner, without repeating, cites the authorities enumerated under its fourth proposition, and adopts the argument thereunder.

6. A pledge by a solvent national bank of a portion of its assets as security for a deposit which it desires to obtain or to retain is presumed to be valid, and this presumption will prevail in the absence of proof to the contrary. *Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693, 695-696; Union Pacific R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564, 41 L. ed. 265.*

Your petitioner adopts as it sargument under this point, the statements contained on page 24 of the foregoing petition, being a portion of the third division of the reasons relied upon for an allowance of a writ of certiorari in this case.

7. When a solvent national bank induces a depositor to cancel and surrender corporate surety bonds protect-

ing its deposit and to accept in lieu thereof other security which the bank is without authority to furnish, moneys thereafter deposited in reliance upon that security are received by the bank as special deposits which it holds in trust for the use and benefit of the depositor, and those deposits, or their equivalent, may be recovered in full from the bank, or its receiver into whose hands they passed upon the bank's failure.

Your petitioner adopts as its argument under this point, the statements contained on page 23 of the foregoing petition, being a portion of the third division of the reasons relied upon for an allowance of a writ of certiorari in this case.

8. When a solvent national bank induces a depositor to cancel and surrender corporate surety bonds protecting its deposit and to accept in lieu thereof other security which the bank is without authority to furnish, the courts will enforce an implied agreement on the part of the bank to return the moneys deposited with it in reliance upon the invalid security, and those deposits never become general assets of the bank which its subsequently appointed receiver may distribute ratably among the bank's unsecured creditors. *Scott v. Armstrong, 146 U. S. 499, 507, 510, 36 L. ed. 1062-1063; Central Transportation Co. v. Pullman Car Co., 139 U. S. 24, 60, 35 L. ed. 55, 69; Aldrich v. Chemical National Bank, 176 U. S. 618, 636, 44 L. ed. 611, 618; Citizens' National Bank v. Appleton, 216 U. S. 196, 206, 54 L. ed. 443, 446.*

Your petitioner adopts as its argument under this point the statements contained on page 25 of the foregoing petition, being a portion of the third division of the reasons relied upon for an allowance of a writ of certiorari in this case.

## Conclusion

It is respectfully submitted that the reasons assigned for an allowance of a writ of certiorari and the points of fact and law raised in petitioner's supporting brief sufficiently indicate the importance to the banking and business industries of an authoritative decision by the Supreme Court on each of the questions presented; and your petitioner prays that this Honorable Court will exercise its supervisory powers by granting a writ of certiorari in this case, and that the Court will review and upon final hearing reverse the decisions of the Circuit Court of Appeals and the trial court, and direct the entry of the judgment sought by your petitioner.

Dated at Dallas, Texas, June 1, 1933.

Respectfully submitted,

THE TEXAS AND PACIFIC RAILWAY COMPANY,
*Petitioner.*

By T. D. Bresham
*Of Counsel.*